No. 75-1510

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In the Supreme Court of the United States

OCTOBER TERM, 1976

JACK M. WEATHERFORD, ET AL., PETITIONERS

v.

BRETT ALLEN BURSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will discuss the following questions: [1]

1. Whether the presence of an undercover agent during a defendant's conversation with his counsel, without more, violates the defendant's right to the assistance of counsel.

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[1] We briefly discuss at note 40, *infra*, the third question presented by the petition.

2. Whether due process of law requires that the existence of an undercover agent be disclosed to the defense in advance of trial.

INTEREST OF THE UNITED STATES

This is an action for damages against an undercover agent and the chief of the state law enforcement agency for which he worked. Although the claims here are founded on the Fourteenth Amendment and 42 U.S.C. 1983, which apply only to the States and persons acting under color of state law, damages actions against federal officers may, in some circumstances, be based upon other provisions of the Constitution. *Bivens* v. *Six Unknown, Named Agents*, 403 U.S. 388. The Court's disposition of this case therefore may affect the personal liability of officers and employees of the United States.

Perhaps even more important, the decision in this case will elucidate the constitutional norms governing the conduct of law enforcement investigative efforts whenever undercover agents or confidential informants are employed, and the need to preserve their "cover" comes into potential conflict with the confidentiality of defense planning in a criminal case. The federal government uses undercover agents, especially in investigations of narcotics and terrorist activities, and the Court's decision will affect the conduct of such operations.

Finally, federal prosecutors are not generally aware of any due process obligation to make pretrial

disclosure of damaging evidence in their possession. The court of appeals' ruling on this aspect of the case, if upheld, would radically transform the nature of federal criminal prosecutions. This case thus is likely to have a substantial impact upon the administration of the criminal justice system, giving the United States a pressing interest in the resolution of the questions presented.

STATEMENT

1. After a jury trial in the Richland County Court of General Sessions of the State of South Carolina, respondent was convicted of causing the malicious destruction of county property (A. 245, 250-251). Respondent took part in the vandalism of the Richland County Selective Service office in Columbia, South Carolina, by spraying and splattering red paint on the outside and inside of the building and throwing a brick and note through a window. The next morning, respondent and petitioner Jack M. Weatherford were arrested as participants in the vandalism. Two other participants in the incident, as well as other aiders and abettors, were not arrested (A. 241). Weatherford was in fact an agent of the South Carolina State Law Enforcement Division, and he testified against respondent at the latter's trial. Respondent, who took the stand and admitted his part in the events (A. 250), was sentenced to 18 months' imprisonment. He did not appeal or seek collateral relief. After fleeing the State and remaining a fugitive for more

than two years, respondent was captured and served his sentence (A. 52, 250-251).

2. Three years after being convicted, respondent began this suit for money damages against Weatherford and against petitioner Pete Strom, Chief of the South Carolina State Law Enforcement Division, and other, unknown state agents (A. 3-6). The complaint alleged that Strom, Weatherford, and others deliberately infiltrated the defense camp for the purpose of becoming privy to defense communications, that Weatherford learned "contemplated defense strategies, pertaining both to factual and legal theories of defense," and that Weatherford reported to Strom or others, "who in turn communicated information pertaining to [respondent's] defense strategies to * * * the State's prosecuting attorney" in the criminal trial (A. 5).

Petitioners' motion for summary judgment was denied (A. 12-20), and a nonjury trial was held. The facts do not appear to have been subject to serious dispute. Following the draft board incident, Strom and Solicitor John Foard, who was to be the prosecutor at respondent's trial, decided that conditions on the campus of the University of South Carolina were explosive because of the reaction to the war in Southeast Asia, and that it would be advantageous for Weatherford (the State's only undercover agent on campus) to maintain his guise and continue his work (A. 105, 118). Weatherford's usefulness depended

on concealing his status.[2] As part of the plan of concealment, Weatherford was indicted for the draft board vandalism and provided with an attorney. Weatherford told respondent, who had retained separate counsel, that they would be tried separately (A. 84, 131, 155, 172-173, 248-249). Strom and others expected that Weatherford would not testify (A. 106, 210-219), although it was understood that there might be a change in that plan (A. 128, 176).[3] He did not testify at respondent's preliminary hearing.

Weatherford never sought to take part in meetings between respondent and his counsel (A. 67, 96, 248). Because it was necessary to maintain his cover, however, Weatherford cooperated in two meetings ini-

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[2] There also was thought to be some danger to Weatherford's life if his status were revealed, for he had participated in many other investigations involving potentially dangerous people (A. 130, 132; but cf. A. 107).

[3] The district court concluded that, until the date of the criminal trial, the prosecutor "intended to use as the primary witness for identification of [respondent] and his participation in the crime one William Burt Finney, III, * * * who * * * had written out for [respondent] the note which was attached to the brick found inside the Selective Service Office" (A. 249-250). The prosecutor testified that he learned of the damage to the draft board the morning after the incident, but that he had not spoken to Weatherford about it, although he knew Weatherford had participated (A. 128). By the time of trial, however, Weatherford's cover was believed lost through other events (A. 250). Not until the jury had been sworn on the morning of respondent's trial did the prosecutor decide to use Weatherford (A. 131). The prosecutor then did not know that Weatherford had met with respondent's attorney (A. 10, 131).

tiated by respondent (A. 97). Respondent arranged these meetings so that his attorney, C. Rauch Wise, who had expressed a desire to meet with all those involved in the case, could meet with Weatherford (A. 34-35).

The first meeting took place at respondent's house; Weatherford testified that when he accepted respondent's invitation, he did not know that respondent's attorney would be present, and that he considered the meeting coincidental (A. 182-183).[4] As Wise described the meeting (A. 81): "It was a case of my asking him questions and he answering, also not only about the case, but * * * about his personal background and so forth, along that line." There was no discussion of defense witnesses, because "we hadn't gotten into the case enough to decide precisely along [w]hat lines we would proceed" (*ibid.*). Wise testified that defense strategy was discussed only to the extent that "we all agreed there was an informant, and [Merrick, the third person present during the draft board incident] was mentioned as being a good probability, due to the fact that he hadn't been arrested and had fled the State and nobody had seen him since the incident" (A. 80). The meeting, then, apparently was devoted primarily to Wise's interrogation of Weatherford as a potential witness (A. 252).

[4] Respondent testified that Weatherford knew in advance that respondent's attorney would be present (A. 65); the district court did not resolve this conflict in the testimony.

Wise suggested that another meeting would be helpful. He and respondent went to see Weatherford at the house of a mutual friend. Weatherford, who did not know in advance about the visit, arrived later (A. 81-82). During this meeting Weatherford, Wise and respondent again discussed the possible existence of an informant. Wise testified that Weatherford denied being an informant and vouched that he would not testify for the prosecution (A. 82-83); the district court concluded, however, that Weatherford was never asked if he were an informant and did not deny being one (A. 249). Wise expressed the view that the defense would be bolstered if no eyewitnesses testified (A. 82-83).

Wise testified that Weatherford may have learned two items of "defense tactics" during the meetings: that while the defense suspected the existence of an informant, they did not know that Weatherford was the informant; and that the defense believed its case would be stronger if the prosecution did not present eyewitness testimony (A. 97-98). Wise agreed on cross-examination that the fact that Weatherford was an undercover agent "had no effect [on the defense] that would not have been present had he not been an undercover agent" (A. 93).

Weatherford's belief that he could not maintain his cover if he were to avoid meetings proposed by respondent was confirmed by respondent himself, who testified (A. 69) that if Weatherford had declined to meet with him, "it would be a chain of events that

ultimately he [Weatherford] would have been caught up in."

Just as he did not tell respondent or Wise that he was an agent, so Weatherford did not disclose prior to respondent's trial any information exchanged during the meetings with Wise—or even the fact that they took place—to Strom, Solicitor Foard, or any other state official (A. 10-11, 104-105, 109, 130-131, 155, 158, 166, 249). If it had been possible to do so, Weatherford would have continued his undercover role and not testified at respondent's trial. Shortly before the trial, however, Weatherford was seen and recognized in the company of state officers (A. 250, 258 and n. 2), and state officials decided that his further usefulness as an undercover agent was jeopardized. Thus, on the morning of trial, Solicitor Foard decided to call Weatherford as a witness. Weatherford's testimony at the criminal trial (A. 225-240) revealed the story of his undercover work up to and including the vandalism of the draft board. The testimony did not refer to his meetings with respondent or his counsel. Respondent made no objection to the propriety of Weatherford testifying or to the admissibility of any of his testimony.

The district court found that Weatherford did not initiate the meetings in question, did not seek information from respondent or his counsel, and did not pass any information about the meetings to any officer of the State (A. 248-249). The court wrote that the meetings represented an attempt by Wise and respondent to obtain information from Weatherford (A. 252), rather than an attempt by Weatherford to intrude. The court also found that state officials, until the very morning of trial, had intended to present their case without Weatherford's testimony rather than "run the risk of revealing him as an undercover agent, due to other matters Weatherford was investigating" (A. 250).

The court concluded that "[n]othing was done by Weatherford, * * * Strom, any [other] agents, the prosecutor or Weatherford's attorney to attempt to obtain information about [respondent], his attorney or his defense plan" (A. 252); it also concluded that because information about defense plans had not been relayed by Weatherford to other officials, Weatherford's presence when defense matters were discussed "did not in any way interfere with [respondent's] right to assistance of counsel or right to a fair trial" (A. 251). Finally, the court held that Strom was not liable because, even assuming *arguendo* that Weatherford had violated respondent's constitutional rights, "there is no testimony connecting defendant Strom with any of such acts allegedly committed by Weatherford" (A. 266).

3. The court of appeals reversed (528 F.2d 483; A. 256-264). It held, first, that Weatherford's meetings with respondent and Wise violated the Sixth and Fourteenth Amendments (A. 260-261). It wrote (A. 260): "whenever the prosecution knowingly arranges or permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to" constitute a violation of the Sixth

Amendment. The court apparently constructed a *per se* rule against such meetings, concluding (A. 260): "That the intrusion [into the attorney-client relationship] was not for the purpose of obtaining information but was to maintain Weatherford's cover is, we think, of no consequence." Nor did the court think it relevant that the meetings did not prejudice the defense, writing (A. 261): "In the context of a civil suit, our holding that [respondent's] sixth amendment right to counsel was violated sustains his suit irrespective of any showing of substantial prejudice to his defense."

The court also held that state officers had denied respondent a fair trial by "countenancing" (A. 261) Weatherford's activities. Referring to *Brady* v. *Maryland*, 373 U.S. 83, it concluded that the government could not "conceal the identity of an informant from a defendant during his trial preparation" (A. 261) or allow the informant to "deny up through the day before his appearance at trial that he will testify against the defendant, * * * then testify with devastating effect" (A. 262). The court thought that the prosecutor's decision not to disclose Weatherford's status as an agent until the beginning of trial lulled respondent "into a false sense of security" (A. 262) and deprived him of "the opportunity (1) to consider whether plea bargaining might be the best course, (2) to do a background check on Weatherford for purposes of cross-examination, and (3) to attempt to counter the devastating impact of eyewitness identification" (*ibid.*).

Finally, the court held that Strom might also be liable to pay damages because his "own decisions" (A. 263) relating to the concealment of Weatherford's identity "directly caused the violation of [respondent's] constitutional rights, and that is a separate basis for liability" (*ibid.*). The court remanded for further proceedings at which petitioners would be allowed to present a "good faith" defense pursuant to *Wood* v. *Strickland*, 420 U.S. 308 (A. 263-264).

SUMMARY OF ARGUMENT

Undercover agents and informants are a necessary, if unpleasant, part of the enterprise of detecting and punishing crimes. Their usefulness (and often their safety) depends upon secrecy, however; once an agent's status is known, he must move on to other things. The Court therefore has recognized that there is a legitimate interest in preserving an agent's "cover" as long as possible, consistent with the rights of defendants. *Roviaro* v. *United States*, 353 U.S. 53. The error of the court of appeals in this case stems from its failure to appreciate this interest and from its simultaneous failure to assess the facts of this case in light of the policies served by the Sixth Amendment's guarantee of the assistance of counsel in criminal cases.

The court of appeals has provided defendants with a fail-safe method of detecting informants. Any defendant could invite one suspected of being an informant to a meeting with counsel. If the invited

individual refused to attend, his status as an informant would be confirmed; if he attended, he would be required to answer in damages, and the defendant might well escape conviction for his crime. We submit that the Constitution does not require such a result.

I

We have no doubt that the Sixth Amendment, which protects many features of our adversary system of criminal justice, establishes at least a qualified right for a defendant to have confidential discussions with his counsel. The ability to keep trial preparations secret from the prosecution is an important attribute of the adversary system. Confidence is necessary else "the client would be reluctant to confide to his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher* v. *United States*, No. 74-18, decided April 21, 1976, slip op. 11.

But the right to counsel does not require confidence or absolute secrecy of trial preparation under all circumstances. For example, even the attorney-client privilege does not apply to conversations held in the presence of unrelated third parties, nor does it shield discussions of future crimes or discussions unrelated to legal matters. Moreover, as *Roviaro* plainly illustrates, cases such as this require consideration of legitimate and important countervailing societal interests that may be imperiled by an absolutist approach. The rules governing these cases must be formulated with reference to the policies that the Sixth

Amendment right to counsel, which is being invoked to condemn petitioners' actions, is designed to serve. In our view, the primary purpose of that right is the preservation of the fair and efficient functioning of the adversary system of criminal justice, and the governing rules in cases like this properly depend, therefore, upon an assessment of the actual or potential effect of the challenged actions upon the adversary system.

Applying these principles, we believe it is not difficult to draw a rational line between improper intrusions into confidential defense planning and strategy, on the one hand, and conduct that is permissible even though entailing some contact between a government informant or agent and the defense, on the other. Thus, a defendant's constitutional rights (either to the assistance of counsel or perhaps, more logically, to due process of law) are infringed when the government insinuates an undercover operative into the defense camp for the purpose of securing information to aid the prosecution in the preparation or conduct of a criminal trial or, similarly, when surreptitious eavesdropping on communications between a defendant and his lawyer is undertaken. Even when there has been no deliberate campaign of intrusion, the utilization by the prosecutor in connection with a criminal trial of confidential defense strategy information that has come into his possession would ordinarily raise serious questions.

But where there has been neither an attempt to intrude nor an improper utilization of confidential

information, there is little threat to the fair functioning of the adversary system, and thus little need to enforce an absolute prohibition under the Sixth Amendment. Passive "intrusions" justified by considerations such as an informant's need to protect his cover should be tolerated so long as they produce no unfair advantage to the prosecution at the trial and do not jeopardize a defendant's ability to present any legitimate defense he may have. The distinction we suggest will protect a defendant against the types of government deceit and use of confidential information that have the greatest potential to undermine legitimate strategy or to inhibit a defendant's communication with counsel.

To be sure, it may be difficult in particular cases for courts to distinguish between prohibited intentional intrusions and permitted "passive" involvement. Whatever difficulties may exist do not appear sufficient, however, to call for the establishment of a prophylactic rule that would outlaw all participation by informants and agents in meetings between defendants and their lawyers. Such a rule would bear too high a price, because it would entirely sacrifice one legitimate endeavor (the use of undercover agents investigating ongoing activities) to another.

We submit that it is not unfair to require a defendant to bear part of the risk that those in whom he places trust may turn out to be agents or informants. A defendant can alleviate almost all of this concern by not inviting third parties to sensitive discussions. True, there may be times when the defense perceives

a need to invite third parties to legal discussions, but we submit that, at least in the absence of a governmental purpose to intrude or to capitalize on information learned during such discussions, if a defendant "has no doubts, or allays them, or risks what doubt he has, the risk is his." *United States* v. *White*, 401 U.S. 745, 752. In this respect the case is similar to Fourth Amendment cases in which the Court has held that the Constitution does not protect a person against the risk that his confidence in someone else may be misplaced.

The court of appeals thought that *Black* v. *United States*, 385 U.S. 26, and *O'Brien* v. *United States*, 386 U.S. 345, "read together, establish * * * a *per se* rule" (A. 260) that any participation in discussions with defense counsel is forbidden by the Sixth Amendment. Both *Black* and *O'Brien*, however, concern electronic surveillance, an intruding third ear of which the defendant and his lawyer were wholly unaware; neither involves a misplaced confidence problem. Moreover, both *Black* and *O'Brien* dealt with situations in which the trial had been completed before the illegal surveillance was discovered; here, by contrast, respondent and his attorney knew that Weatherford had attended two meetings with them, and counsel's cross-examination of Weatherford could proceed accordingly. *Black* and *O'Brien* therefore do not support the court of appeals.

The fact that Weatherford testified at respondent's criminal trial after participating in the meetings does not affect our analysis. The violation of

the Sixth Amendment occurred, if at all, either when Weatherford attended the meetings or when the prosecution capitalized on information Weatherford learned. We have argued that Weatherford's attendance in order to protect his cover did not violate the Constitution, and the district court found that he did not convey any information to the prosecutor or capitalize upon it in his testimony. See *Hoffa* v. *United States*, 385 U.S. 293, 307-309.

II

The State did not deny respondent a fair trial by withholding notice of Weatherford's status until he testified at trial. Weatherford's testimony and identity were not exculpatory evidence; indeed, it was precisely because of their damning effect that the court of appeals required advance notification. But there is no requirement that the prosecution notify the defense, in advance of trial, of its most potent evidence. "[I]t has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge." *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, slip op. 14 n. 20.

Discovery in criminal cases is a recent development. As late as 1944, when Fed. R. Crim. P. 16 was first promulgated, there was none in the federal courts. The long acceptance of criminal practice without pretrial discovery suggests that the Due Process Clause does not compel the prosecution to

surrender to the defense its best evidence; only three years ago the Court wrote that the "Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded" (*Wardius* v. *Oregon*, 412 U.S. 470, 474), and nothing has happened since then to call for a different rule.

The government's constitutional duty to disclose extends no further than the duty to disclose material exculpatory evidence known to the prosecutor. See generally *United States* v. *Agurs*, *supra*. Important considerations, including preservation of the traditional adversary system, prevention of manufactured evidence, and forestalling threats to or subornation of potential witnesses, weigh against a system of pretrial disclosure of the prosecution's case. The only harm to petitioner here was caused by his surprise at the turn of events when Weatherford was offered as a witness. The usual remedy for genuine surprise is a continuance. Respondent's counsel did not request a continuance, however, and respondent cannot now complain that his trial was fundamentally unfair.

ARGUMENT

INTRODUCTION

It is perhaps useful to observe at the outset that this case does not present any question whether this use by state law enforcement officers of an undercover agent to monitor activities on the campus was a proper law enforcement activity under the circum-

stances or was an unjustifiable invasion of the First Amendment rights of respondent and others. Evidence introduced by petitioners indicated that the State used Weatherford as an undercover agent to help it prevent, detect, and punish crimes of violence during a time of great turmoil on the Nation's college campuses.[5] Respondent may well contend that the true motive behind Weatherford's undercover activities was to impede or stifle the legitimate expression of controversial views. However, respondent's complaint (A. 3-6) did not allege that Weatherford's activities violated his First Amendment rights or that the undercover use of Weatherford was illegal, except insofar as Weatherford participated in the two meetings with respondent's counsel and testified at trial, and insofar as both petitioners failed to disclose Weatherford's true status in advance of trial.

Accordingly, there was no occasion for the district court to consider the propriety of the State's undercover investigations, and it properly made no findings on the subject. Nor does the court of appeals' opinion indicate that its decision depends in any way upon conclusions regarding the legitimacy of the undercover investigation in a particular case; rather, the principles it announced would apply to all such investigations.

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[5] Weatherford detected and reported plans to make and use Molotov cocktails, and he testified that respondent acquired and kept weapons (A. 241, 227-229). Solicitor Foard testified that there was some concern that Weatherford's life might be in danger once his status as an agent became known (A. 130, 132).

Thus, we need not and do not, in presenting our arguments in this case, express either approval or disapproval of the State's purposes and methods in pursuing undercover investigations through the use of petitioner Weatherford (a matter on which no adequate record has been developed). While under our analysis the reasonableness of a decision that an agent's undercover status should be maintained may be relevant to the legitimacy of his continued contacts with a criminal defendant (see pages 20-22, 27-31, *infra*), the issues before this Court concern general standards of conduct in connection with the activities of undercover agents engaged in investigations whose legitimacy is not questioned. Thus, the way the Court resolves the questions here will likely determine whether, and to what extent, law enforcement officers can continue to make use of undercover agents after the first arrest for a crime about which they may have knowledge.

Undercover agents are a necessary, if unpleasant, part of the enterprise of detecting and punishing crimes. "Indeed, it has long been acknowledged by the decisions of this Court, see *Grimm* v. *United States*, 156 U.S. 604, 610 (1895), and *Andrews* v. *United States*, 162 U.S. 420, 423 (1896), that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identities of its agents." *Lewis* v. *United States*, 385 U.S. 206, 208-209, footnotes omitted. Without the use of informants and undercover agents the government would be unable to prosecute many crimes;

others, especially those such as narcotics offenses, in which the victims cooperate in or facilitate the crime, would not even be detected. See *United States* v. *Russell*, 411 U.S. 423, 433.

The informant and the undercover agent therefore are important parts of the arsenal of weapons against crime. But their usefulness depends upon secrecy; once an informant or agent has testified or revealed his status, he must move on to other things. If law enforcement officers regularly revealed the identity of an informant or agent as soon as he had acquired information about a single crime or offender, the utility of such an informant or agent would be severely diminished. This Court therefore has recognized that there is a legitimate interest in maintaining an informant's or undercover agent's "cover" as long as possible, consistent with the rights of defendants. *Roviaro* v. *United States*, 353 U.S. 53. Sometimes secrecy may be maintained indefinitely, even through the criminal trial of one with whom the informant or agent has been associated. Sometimes the informant's identity must be revealed at trial, as in *Roviaro*. Here, as elsewhere when fundamental interests are involved, there is no easy solution, and "no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information [about crime] against the individual's right to prepare his defense." *Roviaro, supra*, 353 U.S. at 62.

In *Roviaro* the public interest "in protecting the flow of information" about crime clashed with the

defendant's ability to call witnesses at trial and to present potentially relevant information to the jury. In this case the public interest "in protecting the flow of information" about crime may conflict with the defendant's right to have the assistance of counsel for his defense. Here, perhaps even more than in *Roviaro*, "no fixed rule" that the informant's identity must be disclosed is desirable. Yet the court of appeals has fashioned just such a "fixed rule" by holding that the Constitution requires informants and undercover agents never to meet with defendants or their counsel, even at the expense of revealing their status, and that the Constitution requires the undercover agent's status as an agent to be disclosed before trial.

Roviaro held that secrecy of an informant's status could often be maintained, recognizing, moreover, that secrecy (at least until the time of trial) is desirable. The court of appeals appears to have assumed that secrecy after the date of a suspect's arrest is undesirable. The rule formulated by the court of appeals gives defendants a fail-safe device to detect informants or undercover agents: any defendant could simply invite one suspected of being an informant or agent to a meeting with counsel. If the invited individual refused to attend, his status as an agent would be confirmed; if he attended, he would be required to answer in damages, and the defendant might well escape conviction for his crime. According to the court of appeals, an undercover agent approached by a defendant or his counsel (or even sur-

prised by them at the house of an acquaintence) must either disclose his status on the spot or quickly turn and walk away before the attorney can ask him any questions; to do anything else would risk exposure to damages and jeopardize the State's ability to prosecute for the crime. We submit that nothing in the Constitution requires this unreasonable result.

The values that may come into conflict when an informant or agent meets with a defendant's attorney are weighty, and the clash between them requires sensitive tools for its resolution. The court of appeals has used a blunt instrument where a scalpel was required. We believe that the resolution of the questions presented here calls for a more detailed analysis of the interests at stake.

I

THE SIXTH AMENDMENT DOES NOT ESTABLISH A *PER SE* RULE FORBIDDING AN UNDERCOVER AGENT TO MEET WITH A DEFENDANT'S COUNSEL

A. The Constitutionality of Petitioners' Conduct Must Be Evaluated by Considering the Extent to Which Such Conduct May Undermine the Proper Functioning of the Adversary System

1. The Sixth Amendment's guarantee of counsel comprises a multitude of rights for a defendant in a criminal case. The Amendment establishes the defendant's right to have counsel even if he is impoverished,[6] the right to have counsel present during

[6] *Gideon* v. *Wainwright*, 372 U.S. 335; *Argersinger* v. *Hamlin*, 407 U.S. 25.

critical stages of the case,[7] and the right to have counsel perform the traditional functions of an advocate,[8] including meeting with his client,[9] planning the defense,[10] presenting evidence and arguments,[11] and marshalling the case on appeal.[12] It establishes, in short, a constitutional right to present a reasonably effective defense.

We therefore have no doubt that the Sixth Amendment establishes at least a qualified right to have confidential discussions with counsel. While confidentiality of attorney-client discussions usually is protected by the common law attorney-client privilege, that objective also has some constitutional dimensions; otherwise "the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher* v. *United States*, No. 74-18, decided April 21, 1976, slip op. 11. The Sixth Amendment also establishes a right for the defendant and his attorney to protect their con-

[7] *United States* v. *Wade*, 388 U.S. 218; *Stovall* v. *Denno*, 388 U.S. 293; *White* v. *Maryland*, 373 U.S. 59; *Massiah* v. *United States*, 377 U.S. 201; *Coleman* v. *Alabama*, 399 U.S. 1. But cf. *United States* v. *Ash*, 413 U.S. 300; *Kirby* v. *Illinois*, 406 U.S. 682.

[8] See *Glasser* v. *United States*, 315 U.S. 60.

[9] See, *e.g.*, *Geders* v. *United States*, No. 74-5968, decided March 30, 1976.

[10] See *Brooks* v. *Tennessee*, 406 U.S. 605, 612-613.

[11] See, *e.g.*, *Herring* v. *New York*, 422 U.S. 853, 857-858.

[12] *Douglas* v. *California*, 372 U.S. 353; *Anders* v. *California*, 386 U.S. 738; but cf. *Ross* v. *Moffitt*, 417 U.S. 600.

fidences from the prosecutor, their opponent in the adversarial system. We conceded as much in our brief in *Hoffa* v. *United States*, 385 U.S. 293,[13] and the Court assumed *arguendo* that it is so (385 U.S. at 307).

The court of appeals thought that this is the end of this case. It is not. It is only the beginning. It is necessary to define the dimensions of the right and to consider its interplay with other important societal interests. Although it may be tempting to declare that there is an absolute "right to confidence," such a declaration would bear too high a price. Rights may have a tendency to declare themselves absolute to the limit of their logic (cf. Cardozo, *The Nature of the Judicial Process* 51 (1921)), but they rarely can be absolute in practice. This is true of the right to the assistance of counsel, as it is of other rights.

For example, there is no right to counsel at every stage of the criminal process;[14] there is no right to the best possible counsel; there is no right to counsel

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[13] We stated (Br. 71) that the Sixth Amendment is violated "if the government places an informant in the defense camp during a criminal trial and receives from that informant privileged information pertaining to the defense of the criminal charges. That is true, we believe, because the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusions by the government, his adversary in the criminal proceeding."

[14] *United States* v. *Ash*, *supra*; *Ross* v. *Moffitt*, *supra*. Cf. *Johnson* v. *Avery*, 393 U.S. 483, 487-488.

when imprisonment is not involved;[15] and a defendant does not have a right to a particular legal service simply because he thinks it might be useful.[16] Most pertinent here, there is no right to perfect confidence in meetings with counsel, especially those to which third parties are invited. The Court held in *Hoffa* that the Sixth Amendment did not preclude an informant from testifying after being present during conversations between a defendant and his attorneys.[17] The Court found that the intrusion had not been used by the prosecution to learn or benefit from confidential communications and consequently that there had been no wrong done to the defendant by the employment of tainted "fruit." Similarly, courts regularly have held that a defendant who attends strategy sessions with other defendants, and later decides to cooperate with the prosecution, can testify about the crime itself despite a claim that he has overheard confidential discussions.[18]

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[15] *Argersinger* v. *Hamlin*, *supra*; cf. *Middendorf* v. *Henry*, No. 74-175, decided March 24, 1976; *Gagnon* v. *Scarpelli*, 411 U.S. 778.

[16] *Ross* v. *Moffitt*, *supra*, 417 U.S. at 616; *United States* v. *MacCollom*, No. 74-1487, decided June 10, 1976.

[17] The testimony in *Hoffa* was given in a trial for a crime (juror bribery) committed during Hoffa's first trial. The Court assumed *arguendo* that the informant could not have testified during the first trial itself, but it held that even if such a bar existed it would not survive in perpetuity.

[18] See, *e.g.*, *United States* v. *Rosner*, 485 F.2d 1213, 1220, 1223-1228 (C.A. 2), certiorari denied, 417 U.S. 950; *United States* v. *Gartner*, 518 F.2d 633, 636 (C.A. 2); *United States* v.

Even the attorney-client privilege is not an absolute shield. It does not forbid disclosure of communications involving the attorney and a third person, so long as the latter is not the agent of either the client or the attorney. 8 Wigmore, *Evidence* § 2311 (McNaughton rev. 1961); *United States* v. *Blackburn*, 446 F.2d 1089, 1091 (C.A. 5). It also does not establish a shield against disclosure of discussions of future crimes, plans for concealment of past crimes, or other discussions unrelated to a proper legal defense. *Clark* v. *United States*, 289 U.S. 1, 15 (*dictum*); 8 Wigmore, *supra*, §§ 2298, 2299.[19]

2. What transpires at a meeting attended by a defendant and his counsel, then, is not forever and inevitably covered by a cloak of secrecy. There are no absolutes here. Rather, the proper rule for assessing the propriety of participation by an undercover informant or agent in meetings at which a defendant and his lawyer are involved in preparation for a forthcoming criminal trial depends upon consideration of the policies underlying the protections afforded by the Sixth Amendment to the trial preparation process.

Rosenberg, 146 F. Supp. 555 (E.D. Pa.), reversed on other grounds, 245 F.2d 870 (C.A. 3). These cases allow the witness to testify about the details of the crime; they do not involve use by the prosecutor of defense confidences.

[19] Cf. *Miranda* v. *Arizona*, 384 U.S. 436, 477-478 (citizens have a duty to report the commission of crimes, and information relating to them is not privileged).

We submit that the Sixth Amendment generally, and its guarantee of assistance of counsel in particular, is designed to ensure the operation of a fair and effective adversary system of criminal justice. As this Court has said: "[T]he right to the assistance of counsel has been understood to mean that there can be no restriction upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process * * *." *Herring* v. *New York*, 422 U.S. 853, 857; cf. *Middendorf* v. *Henry*, No. 75-175, decided March 24, 1976, slip op. 14. Accordingly, in determining whether particular actions infringe the Sixth Amendment right to the assistance of counsel, the Court must ask—as the court of appeals failed to do —whether the actions threaten to undermine the proper functioning of the adversary system.[20] Only when there is a potential for subversion of the adversary system does the possibility of a Sixth Amendment violation arise, and even then the gravity of any danger should, as in *Roviaro*, be weighed against such substantial countervailing interests as may legitimately require consideration.

The present case does not, we submit, cross the threshold of potential constitutional violation, for

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[20] This does not mean that the Sixth Amendment enshrines every feature of the adversary system now commonly used. The Amendment requires only that the system have certain basic adversary characteristics, including freedom from pretrial meddling that unjustifiably undermines the effectiveness of counsel.

there was no plan or purpose by state officials to acquire defense strategy information and thereby facilitate the prosecution's task in the trial of respondent, nor was there any actual acquisition of information about defense strategy that might have aided the prosecution in its contest with the defense. What happened in this case had, as we discuss fully below, neither actual nor potential detrimental effect on the functioning of the adversary system in respondent's criminal trial.

In saying the foregoing, we do not mean to deny that effective representation of a criminal defendant requires substantial freedom from intrusion by the government, the defendant's adversary in the criminal proceedings. The defendant must feel free to exchange ideas and information with his lawyer; and the nature of the adversary system requires that neither side be permitted to gain unfair advantage over the other by secret acquisition of information about the adversary's trial preparation. Accordingly, to the extent that an intrusion upon the confidence of a meeting between a defendant and his attorney unfairly yields knowledge for the prosecution, or insofar as it unjustifiably inhibits communication between defendant and counsel or otherwise impedes the defendant's legitimate preparations for trial, it should not be tolerated.

We can envision several sorts of intolerable intrusions. The first and most serious is an attempt by the prosecution to insinuate an agent into the defense camp for the purpose of learning information vital to the defense, or the prosecution's use of physical

searches or electronic surveillance to the same end. The danger created by this type of intrusion is patent; at the same time there is no countervailing legitimate governmental interest in employing such tactics. The two leading cases characterized by this Court as involving "government intrusion of the grossest kind upon the confidential relationship between the defendant and his counsel" (*Hoffa, supra*, 385 U.S. at 306), grew out of episodes of this sort. *Coplon* v. *United States*, 191 F.2d 749 (C.A.D.C.), condemned the surreptitions overhearing of privileged legal discussions, followed by use of that information to the detriment of the defense. *Caldwell* v. *United States*, 205 F.2d 879 (C.A.D.C.), condemned the practice of instructing an agent to inveigle his way into strategy sessions and to report to the prosecution what was said.

In both of these cases, and in others of similar patterns, the government's conduct has been characterized by "offensive interference with the defendant's rights without any justification" other than the acquisition and use of privileged or confidential information. *United States* v. *Gartner*, 518 F.2d 633, 637 (C.A. 2). In these cases some sanction against the governmental conduct is necessary. "The constitutional barrier is raised when it is the Government that unlawfully intrudes on legal strategy conferences, as when it eavesdrops by electronic means * * * or when it 'plants' a spy in the legal conference * * *." *United States* v. *Rosner*, 485 F.2d 1213, 1227 (C.A.

2). The violation of the Sixth Amendment is caused by the "corrupting conduct" (*ibid.*) of the government, conduct engaged in solely to gain unfair advantage over the defendant in the forthcoming criminal trial.[21]

Coplon, *Caldwell*, and similar cases involved a frontal attack by the government on the proper functioning of the adversary system. In those cases there was deliberate, surreptitious acquisition of defense secrets, which were communicated to the prosecution to assist it at trial. There were, moreover, no countervailing interests justifying such behavior (indeed, it would be difficult to imagine such interests in that context). Such conduct can reasonably be found to deprive the defendant of the effective assistance of counsel (or, perhaps more reasonably, to violate due process standards by undermining the fairness of the trial).

There may also be danger in prosecutorial use of defense secrets acquired in less devious ways. It is arguable that any use by the prosecutor, in the course of preparing for and conducting a criminal trial, of

[21] *Massiah* v. *United States*, 377 U.S. 201, provides an interesting counterpoint to the instant case. The government arranged for an informant to meet with Massiah in the absence of his counsel, and Massiah made incriminating statements. The Court held that the use of such statements against Massiah at trial (but not necessarily the meeting itself) violated the Sixth Amendment because it represented an attempt to capitalize upon the absence of counsel without legitimate justification. Moreover, the Court seemingly implied that a meeting with counsel present would not have violated the Constitution.

confidential information about defense strategy should be condemned, no matter how the information was learned.[22] There is no significant legitimate prosecutorial interest in capitalizing upon confidential information about defense tactics, so long as those tactics are themselves legitimate. Use of such information, however acquired, could create a significant risk of interfering with the ability to mount an effective defense. There is a potential for mischief in the "subtle benefits that might consciously or unconsciously accrue to the government in knowing the planned procedure, or even the state of mind of the defendant and his counsel *with respect to the trial*, quite apart from hearing affirmative evidence, or leads to evidence." *Taglianetti* v. *United States*, 398 F.2d 558, 570 (C.A. 1) (emphasis in original), affirmed on other grounds, 394 U.S. 316.

[22] A similar rule applies to information covered by the attorney-client privilege. 8 Wigmore, *supra*, §§ 2327-2329; McCormick, *Evidence* § 93 (2d ed. 1972). There also is an analogy to the work product doctrine, which shields from disclosure information created by the attorney or at the attorney's request and important to effective trial preparation or strategy. The work product doctrine applies in criminal cases and may be so important to the adversary system that it is protected by the Constitution. *United States* v. *Nobles*, 422 U.S. 225, 236-240. As *Nobles* itself indicates, however, trial preparation by the defense is not inevitably immune from disclosure, but may be compelled when appropriate in accordance with the traditional workings of the adversary trial system (*i.e.*, to the extent similar material could be required to be disclosed by the prosecution).

B. There Is No Reason to Erect a Prophylactic Rule That All Overhearings of Meetings With Counsel Violate the Sixth Amendment

1. The dangers we have discussed so far all arise only when there is either (1) governmental action directed at procuring defense strategy information to aid the prosecution at trial or (2) actual acquisition by the prosecution of confidential defense strategy information. Sixth Amendment concerns are activated in such circumstances because of the threat posed to the fair functioning of the adversary system. In this case, the findings of the district court establish that neither of these predicates to a Sixth Amendment violation was present. It remains to ask whether an absolute prohibition should be adopted for prophylactic purposes even though there is evidence of neither purpose to invade nor design to capitalize upon defense secrets. We think not.

Without the use of governmental power to intrude, and without the acquisition of confidential information by the prosecutor, no unfair advantage can accrue to the prosecution, and there ordinarily would be no constitutional violation. A prophylactic rule absolutely prohibiting any participation by a government agent in meetings with defendant and counsel can be justified, if at all, only on the ground that otherwise defendants and their counsel might feel inhibited by the fear that an intrusion would occur and that the prosecution might learn and capitalize upon their private exchanges. If such apprehension were widespread, the adversary system and the ef-

fectiveness of counsel might be eroded to an unacceptable degree. We submit, however, that the possibility of inhibiting attorney-client communications does not support a *per se* rule that excludes any inquiry into the nature or extent of the problem in particular cases.

Much of the potential for inhibition is, after all, within the control of the defendant and his attorney. If they are concerned that a third party may turn out to be an agent or an informant, they have a ready remedy: they can avoid inviting third parties to defense meetings. Also, the attorney can meet with third parties, such as Weatherford, alone. And during any meetings, the defendant and his attorney can ask questions but avoid revealing defense strategy. These approaches are open whenever a co-defendant has separate counsel and will be tried separately, and so it could have been followed here even though Weatherford was also charged with the offense. Weatherford told respondent at the outset that they would not be tried together, and Weatherford and respondent had separate counsel. Respondent was not compelled to admit Weatherford to his strategy sessions or to convey information to him.

We do not claim that the defendant's option to exclude third parties is in every case sufficient to guard against inhibition. Discussions with co-defendants, witnesses, or others are often valuable, and it may be difficult to gather necessary information without revealing some confidences. But important governmental interests, too, are involved. We have discussed

(pages 19-22, *supra*) the importance of using informants and undercover agents and of keeping their identities secret as long as possible. So long as this practice continues, there is always a risk that an agent or informant may be drawn, without knowledge or even against his will, into discussions with a defendant and his attorney. Unless the Court is willing to hold that the agent so invited must promptly disclose his status, there must be some room for such meetings consistent with the Sixth Amendment. So long as the agent does not take the active role or invite himself to defense meetings, and so long as the agent does not disclose defense strategy information to the prosecution or alter his testimony to capitalize upon what he learned, the defense cannot suffer.[23] We submit that defendants, aware of the prospect of such relatively harmless overhearings on rare occasions, would not be so afraid to communicate with their lawyers that their defense would suffer.[24]

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[23] The Federal Bureau of Investigation has taken steps to ensure that federal agents and informants will not unjustifiably overhear defense planning sessions. Agents and informants are instructed not to attend such sessions, if they can be avoided consistently with maintaining the secrecy of their status. They also are instructed that if they are drawn into meetings with counsel, they should not report to their superiors or to a prosecutor what they have heard.

[24] Our submission is supported by the decisions of most courts that have considered the problem. See *United States* v. *Gartner*, *supra*, 518 F.2d at 637; *United States* v. *Crow Dog*, 532 F.2d 1182, 1197-1198 (C.A. 8), petition for a writ of certiorari pending, No. 75-1843; *United States* v. *Scott*, 521 F.2d 1188, 1192 (C.A. 9), certiorari denied, March 8, 1976 (No. 75-5799); *United States* v. *McCord*, 509 F.2d 334, 353 (C.A.D.C.), certiorari denied, 421 U.S. 930; *United States* v. *Brown*, 484 F.2d 418, 424 (C.A. 5), certiorari denied, 415 U.S. 960; *Manuel* v. *Salisbury*, 446 F.2d 453, 456-457 (C.A. 6). Cf. *United States* v. *Valencia*, C.A. 6, No. 75-1342, decided September 2, 1976, slip op. 8 (although we agree with much of the test articulated in this case, we do not agree that the court correctly applied it to exclude evidence as to the attorney, and persons not his clients, who engaged in crimes planned by the attorney).

An informant's or undercover agent's "passive" attempts to protect his disguise may require him to participate in meetings with a defendant, and a rule permitting such participation would compel a defendant to bear some of the risk that his confidence in those whom he invites is misplaced. The Court consistently has held, however, that "the Fourth Amendment [does not protect] a wrongdoer's misplaced

The court of appeals here attempted to draw support from *United States* v. *Rispo*, 460 F.2d 965 (C.A. 3). But *Rispo* declined to "lay down a rigid standard of prejudice *per se*" (*id.* at 977) and reversed a conviction only after finding that "the factual tableau presented here is shocking" (*ibid.*). In *Rispo* the government had permitted an informant to be tried (and, indeed, to be convicted) together with his co-defendants before revealing his identity to the court or jury. The informant's attorney had consulted actively with counsel for the other defendants both before and during trial and had discussed those strategy sessions with the informant (*id.* at 976 n. 22). The court emphasized that the "deception practiced here continued through the entire trial, with the result that the Government foisted the deception upon the trial court" (*id.* at 977). It concluded that this was "a preconceived and intentional plan to disregard legal standards and precedents in criminal prosecutions" (*id.* at 978). See also *United States* v. *Lusterino*, 450 F.2d 572 (C.A. 2) (informant tried with other defendants).

belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa*, *supra*, 385 U.S. at 302. See also *United States* v. *White*, 401 U.S. 745, 751-752; *Lewis* v. *United States*, *supra*; *Lopez* v. *United States*, 373 U.S. 427, 438.[25] A similar principle should apply to Sixth Amendment claims. The government should not be required to shoulder the full responsibility for preserving a defendant's confidences.[26]

The defendant can protect his own confidences, as we have pointed out, by not inviting third parties to defense meetings at which sensitive or confidential matters will be breached. A defendant who invites others to join his council should not be able, by issuing an invitation, to compel an agent to reveal his identity. Indeed, so much seems clear from *Lewis*, in which the Court wrote (385 U.S. at 211) that "[a] government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." There may be risks in inviting third parties to legal discussions, just as there are risks in inviting third parties to

[25] Cf. *United States* v. *Miller*, No. 74-1179, decided April 21, 1976, slip op. 7-8.

[26] This concern is particularly pressing where the third party is a casual informant rather than a full-time agent. The prosecution, and the government as a whole, has significantly less control over the activities of "informants" than it does over the activities of "agents," and it would be unrealistic to treat these cases as if all of the informant's decisions are inevitably chargeable to the government.

commit crimes, but we submit that, at least in the absence of a governmental purpose to intrude on legal discussions or to capitalize from information learned during an intrusion, if a defendant "has no doubts, or allays them, or risks what doubt he has, the risk is his." *White*, *supra*, 401 U.S. at 752 (plurality opinion).

2. We recognize that at times it may be difficult to determine whether any defense confidences have been passed on to the prosecution by an agent in Weatherford's position or have been used in some indirect way to ease the prosecution's burden. A prophylactic rule automatically condemning the presence of agents or informants at meetings with defendants' counsel without regard to the circumstances would relieve the courts of occasionally difficult problems of decision that will be presented in particular cases, but this is insufficient to justify an absolute prohibition. Decisions turning upon motive, purpose, and intent may be difficult, but they are often made: a defendant's criminal liability may turn upon his intent, as may the size of his taxes and whether he has commited a tort. Cf. *Wood* v. *Strickland*, *supra*. The difficulty in the application of these factors has not prevented their use where they provide the proper dividing line between the prohibited and the permitted. Cf. Holmes, *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1 (1894). The problems in applying the standards we have advocated are surmountable. Perhaps other cases will reveal difficulties we do not now perceive in making the distinctions we believe

the Constitution requires, but there will be time enough to adopt a prophylactic rule in the future if case-by-case adjudication proves impractical or provides illusory protection for criminal defendants' legitimate interests.[27]

3. Our analysis thus requires a case-by-case scrutiny of claims that official conduct has undermined the defense by invading its confidences, and the action of the government would be condemned only if there were a governmental purpose to invade confidences or prosecutorial capitalization upon knowledge of defense strategy. The court of appeals eschewed such an approach, adopting instead a *per se* rule that informants never can meet with defendants and their attorneys. It wrote that *Black* v. *United States*, 385 U.S. 26, and *O'Brien* v. *United States*, 386 U.S. 345, "read together, establish * * * a *per se* rule" (A. 260) that any participation in discussions with defense counsel is forbidden by the Sixth Amendment. We think that the court of appeals has read *Black* and *O'Brien*—which were decided the same Term as *Hoffa* —for a much broader proposition than they will support.

In both *O'Brien* and *Black* the Solicitor General advised the Court of the government's discovery that federal agents, using electronic devices, had monitored conversations between the defendants and their attorneys during trial preparations. In *Black* the contents of the recorded conversations had been incorporated in memoranda used by the prosecuting attorneys; in *O'Brien* the Solicitor General represented that the monitored conversations had not been communicated to the prosecutor. In both cases the Court, without the benefit of briefs on the merits or oral argument, reversed the judgments and remanded for a new trial. In *Black* the Court explained that "[t]his will give the parties an opportunity to present the relevant evidence and permit the trial judge to decide the questions involved" and would "permit the removal of any doubt as to Black's receiving a fair trial * * *" (385 U.S. at 29).

We believe, with the dissenting Justices in *Black* and *O'Brien*, that justice could have been fully served by a remand to the district court for a hearing into whether the defendants' convictions had been tainted by the overheard information. However that may be, *Black* and *O'Brien* concern only surreptitious electronic surveillance of defense strategy meetings. Neither case suggests that the Sixth Amendment is violated whenever a defendant, misplacing his confidence in an informant, invites him to attend a meeting with counsel. Indeed, *White* and *Lopez* make it clear that there is a fundamental difference between "misplaced confidence" cases and surreptitious overhearings.

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[27] In the absence of evidence to the contrary, the Court should presume that, once it has clarified the obligations of agents and informants, they will undertake their roles faithfully to the requirements of law. *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15.

Black and *O'Brien* involved electronic surveillance; each gave rise to the specter of the "surreptitious [presence of a] third ear" (*United States* v. *White*, 401 U.S. 745, 784 (Harlan, J., dissenting)). In each, "unknown and unwanted intruders * * * furtively listened to [privileged] conversations." *Lewis* v. *United States*, *supra*, 385 U.S. at 212. In each, the defendant and his attorney not only were unaware of the intrusion at the time it took place, but also remained ignorant of the intrusion until long after the criminal trial had been completed. During the *Black* and *O'Brien* trials the defendants and their attorneys lacked the knowledge that would have permitted them to listen to the trial testimony alert for evidence that might have been derived from an intrusion into defense strategy sessions; they could not probe on cross-examination the source of prosecution testimony to find out whether it was derived in part from defense discussions. It may well be that the Court believed that a taint hearing several years later would not be an adequate substitute for the type of scrutiny that takes place before or during the trial.

In the instant case, however, respondent and his attorney knew from the moment Weatherford took the stand that he had participated in the two discussions with counsel; they sat through his testimony with the knowledge of what had been said at the meetings; they could have cross-examined him with an eye toward exposing any effect the defense discussions

might have had on his recollection of the events. Consequently, respondent and his attorney had an opportunity to expose any fruits of the sessions. Their failure to mention to the court that Weatherford had participated in defense discussions, their failure to raise the question on appeal, and their failure collaterally to attack the conviction demonstrate that there was no taint. Accordingly, even if automatic reversal is necessary in the *Black* and *O'Brien* situation, it does not follow that a constitutional violation took place here. Cf. *Estelle* v. *Williams*, No. 74-676, decided May 3, 1976.

C. Weatherford's Conduct in This Case Did Not Jeopardize the Defense or Inhibit Respondent's Discussions With His Attorney

If the rule for which we have argued is correct, then it follows that Weatherford's attendance at the two meetings between respondent and Wise did not violate the Sixth Amendment. Weatherford did not set out to invade any confidences; he did not pass any information to the prosecutor; he did not undermine respondent's defense or inhibit respondent's discussions with his counsel.

Following the arrest of respondent and Weatherford the day after the incident at the draft board, Strom decided to attempt to maintain Weatherford's cover in order to help maintain order at the university (A. 105). Weatherford was the only undercover agent on campus (A. 118). At the time, no one intended to use Weatherford as a witness in respond-

ent's criminal trial (A. 104, 107), although Strom and Foard recognized that Weatherford might be called (A. 128, 176). Respondent himself described the events that suggest that this decision was not unreasonable (A. 44-45):

> [T]hat May was a rather hectic period of activity for a lot of anti-war activists all over the country. Cambodia had been invaded by Mr. Nixon. There was a widespread response all across the country. * * * [T]he University of South Carolina [was shut down] by vote of the student body * * * to indicate their displeasure with * * * the war * * *. * * * [T]here was a vote * * * to strike classes * * *. [D]uring that time was * * * the killings at Kent State, when four students were shot. The National Guard was on the campus at the University of South Carolina. * * * It was a very high level of emotions at that time * * *. People who had a very definite commitment to oppose the war [in Southeast Asia] were very angered and upset by what was going on, and it was a time of high emotions * * *.

Weatherford had been an undercover agent for approximately a year and had established his "cover" well enough to be able to monitor the "high emotions" from the inside (A. 45). The intelligence Weatherford was able to supply made it more likely that the state officials could take steps to avoid mass confrontations, which sometimes lead to violence. Weatherford could not be replaced on short notice; it had taken him a long time to establish his cover. Respondent himself recognized that Weatherford's

status would have been jeopardized if he had continued to avoid meeting with respondent and his attorney (A. 69).

We do not contend that it was imperative that the State continue to employ Weatherford as an undercover agent; we have pointed out at pages 17-18, *supra*, that the propriety of Weatherford's activities as an agent has not been challenged here except to the extent of his meetings with Wise and his testimony at trial. That being so, the Court must assume, as the district court concluded (A. 250, 253), that the State had a legitimate interest in maintaining Weatherford's cover and was entitled to take reasonable steps to do so.

Weatherford never sought to initiate the meetings with respondent; in fact, he discouraged them by retaining his own attorney and telling respondent that his case would be severed (A. 67, 96, 244). Weatherford testified that both meetings with respondent and his attorney were unanticipated (A. 182-183). Wise testified that he thought an informant was involved (A. 78); it made little difference to the defense whether Weatherford or someone else was the informant (A. 93).

Moreover, there is no indication that Weatherford learned anything useful at the defense discussions. One does not need to be privy to defense strategy discussions to know that the defense case is stronger if the prosecutor does not have any eyewitnesses testifying at trial; yet this (together with the information that the defense did not know that Weatherford was the informant) was the only thing revealed to

Weatherford during the discussions (A. 97-98). The rest of the meetings consisted of Wise's questioning of Weatherford (A. 81). Even the trivial information Weatherford learned was not relayed to Strom, to the prosecutor, or to anyone else (A. 249).[28] It is difficult to see what else Weatherford and Strom could have done to protect respondent's rights, other than to disclose Weatherford's role as an undercover agent.[29] Yet they deemed that avenue to be foreclosed

[28] The court of appeals noted (addressing the issue of damages) that Weatherford, who was "fully acquainted with [respondent's] trial strategy, talked with Solicitor Foard, who prosecuted the case, before trial * * *" (A. 261). That conversation occurred only minutes before the trial and evidently consisted of no more than Foard's indicating to Weatherford the possibility that he might have to call him as a witness (A. 132-133, 192-193). There is no evidence that Weatherford gave valuable information to Foard, and the district court explicitly found (A. 249) that he did not. Nor, of course, is there any evidence that Weatherford was "fully acquainted" with respondent's trial strategy.

[29] One alternative course might have been to postpone arresting respondent for the vandalism of the draft board until Weatherford's usefulness as an undercover agent had been exhausted. This course, too, would have had its dangers; if Weatherford had continued to associate with respondent after the crime and before respondent's arrest, respondent might have claimed that the delay had been arranged in order to produce an advantage for the prosecution (cf. *Hoffa, supra*, 385 U.S. at 309-310). Respondent also might have asserted that the pre-accusation delay violated the Due Process Clause. Cf. *United States* v. *Marion*, 404 U.S. 307, 324-325. Although we believe that a legitimate desire to protect the "cover" of an informant or agent is an adequate reason for delay, a defendant might claim that evidence disappeared during the interim. If expeditious trials are advantageous for defendants, it is

by what they perceived to be the dangerous situation on the university campus. These facts do not bespeak a violation of respondent's right to the effective assistance of counsel.

In sum, this case involves no exercise of governmental power or guile to intrude into secret councils; Weatherford was invited to attend even though the defense suspected there was an informant and had reason to believe he might be the informant (A. 253). This case involves no design on the part of a government agent to observe or hear the defendant's strategy; the defendant made the request, choosing the times, places, and subjects of discussion. This case involves no plan to relay information to the prosecutor; the agent kept what he learned to himself. This case involves no disruption of the defense strategy; the agent did not volunteer misleading information.[30] The agent may have influenced the course of the defense, but that influence depended on the deception inherent in the maintenance of his "cover," not upon his attendance at the meetings with counsel. There was no risk of interference with respondent's ability to consult with counsel and to defend himself,

hard to say whether they would, as a rule, prefer to have their trials postponed (because of pre-accusation delay) or to take the slight chance that confidences will be heard during an exchange with counsel. The Constitution should not be read to compel the State to choose delay rather than the course it followed here.

[30] See A. 253. Respondent contends that Weatherford did volunteer misleading information, but the district court disagreed.

and therefore there was no violation of the Sixth Amendment.

D. If Weatherford's Presence at the Meeting With Counsel Did Not Violate the Sixth Amendment, Then Neither Did His Testimony at Respondent's Trial

The court of appeals held that Weatherford's presence at the meetings with respondent and Wise violated the Sixth Amendment independent of any later events. It is possible to argue, however, that even if Weatherford's mere attendance at the meetings was not improper, he should not thereafter have testified. We submit, however, that his testimony is not open to such a challenge.

1. Weatherford's testimony was not a "fruit" of his attendance at the meetings

If Weatherford had not met with respondent and Wise, there would be no question about the propriety of his testimony, which was wholly concerned with events observed prior to those meetings. Any error in allowing him to testify could come about only because allowing testimony after a prosecution witness has met with defense counsel would somehow confer an unfair advantage on the prosecution. Such an advantage would be likely to occur, we think, only if the agent were allowed to testify about what transpired at the meetings or if it were shown that he had capitalized upon what he learned there.

This argument is consistent with, if it is not required by, this Court's decision in *Hoffa*. While

Hoffa was standing trial for one offense, an informant, Partin, regularly saw Hoffa and participated in discussions with Hoffa's associates. The Court assumed that Partin was engaged in these endeavors at the government's behest, that he took part by invitation in meetings between Hoffa and his attorneys, and that he reported some of what he heard to federal agents. The Court concluded, however, that these overhearings did not affect Partin's testimony at Hoffa's later trial for obstruction of justice and that there was no need to exclude Partin's evidence from that trial. *Hoffa* stands, at a minimum, for the proposition that an informant's presence during a defendant's discussions with his lawyer does not invariably infect the informant's later testimony. The Court assumed in *Hoffa* that Partin's overhearings of the discussions with counsel were improper; it nevertheless held that Partin's testimony was not a fruit of his overhearings and that it therefore was admissible.

If the testimony was admissible in *Hoffa* even on the assumption that the overhearings were improper, it follows directly that Weatherford was entitled to testify at trial, if, as we have argued, the overhearings in this case did not violate the Sixth Amendment.[31] Weatherford's testimony was not in any sense

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[31] The Court assumed *arguendo* that Partin could not have testified at Hoffa's first trial. That assumption was based upon the further assumption that Partin's conduct during the first trial violated the Sixth Amendment. We have argued that no violation took place during Weatherford's meetings with Wise, however, and, if we are right, there would be no reason to bar Weatherford from testifying at any time.

a fruit of what he heard. It was eyewitness testimony describing what he saw during the crime.[32] The district court found that the prosecutor's questions and strategy were not influenced by what went on at the meetings Weatherford had with respondent and Wise, because the prosecutor did not know about these meetings (A. 249-250, 252); the court of appeals did not disagree. Wise had an opportunity to cross-examine Weatherford at respondent's criminal trial, and nothing in this cross-examination suggests that Weatherford's eyewitness testimony was strengthened by what he later heard (A. 234-240). Because Weatherford's testimony was not the fruit of any constitutional violation, it was admissible.[33]

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[32] Weatherford's testimony consisted almost entirely of his eyewitness observations of respondent's participation in the assault on the Selective Service office (A. 225-240). Moreover, there is no indication in this record that respondent and Weatherford had ever disagreed about the facts of the offense. (There is thus no reason to believe that Weatherford's talks with respondent and Wise enabled him to anticipate defense cross-examination on the facts.) Respondent took the stand in his own defense and conceded his involvement in the acts charged, disputing only the State's characterization of his intent as malicious within the meaning of the statute (A. 250).

[33] In cases in which it is alleged that an informant has overheard defense strategy discussions it will, of course, ordinarily be necessary to hold a taint hearing. It may be difficult, in many cases, to determine whether testimony at trial is a fruit of what the informant learned, and courts might properly resolve doubts in favor of defendants. We perceive no reason, however, for a rule that entirely dispenses with such an inquiry, other than as a sanction for governmental misconduct of a kind that was wholly lacking here.

2. *Weatherford's testimony at trial is not an appropriate source of civil liability*

There is an important difference between the argument that Weatherford should not have met with Wise and the argument that Weatherford should not have testified: the former may show a violation of the Sixth Amendment regardless of its effect upon events at trial, but the latter is an assertion that the trial itself was infected by error. The usual remedy for trial error is an objection at trial and, if the objection fails, an appeal. If Weatherford's testimony at trial was a constitutional violation, a timely objection presumably would have prevented any error in allowing him to take the stand. We submit that there is little justification for civil damages liability when a defendant has bypassed the ordinary mechanism for asserting a trial-type right of this sort. At a minimum respondent should not be allowed to complain about damages that are attributable to his failure to mitigate his losses by objecting at trial. Several arguments support this result.

a. Weatherford was called to the stand by Solicitor Foard. Weatherford had no valid privilege to refuse to testify and no reason to believe that, if his testimony would be improper, respondent's attorney would fail to object. Strom, too, was not empowered to countermand Foard's decision. Although Strom evidently did not attempt to dissuade Foard from calling Weatherford, Strom should not be required to anticipate that respondent's attorney would fail to interpose any valid objection. It is particularly difficult to second-

guess Strom's inaction in light of the fact that Strom did not know that Weatherford had met with Wise (A. 248, 251, 255). Solicitor Foard is absolutely immune from damages on account of his actions as a prosecutor (*Imbler* v. *Pachtman*, 424 U.S. 409). No useful purpose could be served by requiring Weatherford or Strom to answer in damages for actions directed by Foard, and for which Foard is immune. Cf. *Doe* v. *McMillan*, 412 U.S. 306, 312-313.

b. Weatherford is absolutely immune from damages for truthful testimony given during a criminal trial, whether or not he was under a compulsion to testify. *Sachs* v. *Stecker*, 60 F.2d 73, 75 (C.A. 2); Harper and James, *The Law of Torts* § 5.22 (1956). Compare *Brawer* v. *Horowitz*, 535 F.2d 830, 836-837 (C.A. 3) (immunity extends even to perjury), with *Hilliard* v. *Williams*, 516 F.2d 1344, 1349-1350 (C.A. 6), certiorari denied, 423 U.S. 1066, (witness may be liable for false or misleading testimony).

c. If respondent has suffered loss at the hands of the State because of a constitutional violation arising from Weatherford's act of testifying, it is only because he should not have been convicted on the basis of such testimony. The Sixth Amendment's guarantees are safeguards ensuring that an accused has assistance in his attempts to understand the case and resist unjust conviction. We doubt that a remedy of money damages should be available when the only claim raised is that the State has adduced improper evidence at trial, at least while the criminal conviction, which necessarily rests upon the assumption that the trial was fair, still stands.

First, to the extent that respondent is arguing that Weatherford should not have testified, his appropriate remedy was to object during his criminal trial, to move to strike the testimony, or to move for a mistrial. He did none of these things. Nor did he appeal. Under these circumstances an excellent argument could be made that, if respondent had a right not to have Weatherford testify, it was a "trial type" right that was bypassed when not raised at trial. See *Estelle* v. *Williams*, No. 74-676, decided May 3, 1976.

Second, it is far from certain that respondent can use a damages action under 42 U.S.C. 1983 to make what amounts to a collateral attack on the criminal proceedings in which he was convicted.[34] See *Guerro* v. *Mulhearn*, 498 F.2d 1249 (C.A. 1); *Martin* v. *Merola*, 532 F.2d 191 (C.A. 2). The propriety of Weatherford's testimony could have been put at issue in respondent's criminal trial. He failed to put it at issue, and collateral estoppel therefore may preclude his litigation of the question in this civil suit. Moreover, the State's very right to try respondent on the criminal charge was at least implicitly at issue in the criminal trial. To the extent respondent now argues that Weatherford's activities (whether by testifying or by simply attending the meetings) un-

[34] Cf. *Preiser* v. *Rodriguez*, 411 U.S. 475, which holds that Section 1983 cannot be used to attack the very fact or duration of confinement. This principle does not apply here directly, for respondent is no longer incarcerated.

dermined the prosecution itself, collateral estoppel is a bar to this action for damages. See *Mastracchio* v. *Ricci*, 498 F.2d 1257 (C.A. 1); *Cardillo* v. *Zyla*, 486 F.2d 473 (C.A. 1); *Scoggin* v. *Schrunk*, 522 F.2d 436 (C.A. 9). Cf. *Ellis* v. *Dyson*, 421 U.S. 426, 440-441 n. 6, 442-443 (Powell, J., dissenting).

d. We do not explore these arguments further, however, for they were not raised below and have not been presented in the petition for a writ of certiorari. The Court therefore need not consider them. *Radzanower* v. *Touche Ross & Co.*, No. 75-268, decided June 7, 1976, slip op. 3 n. 3; *Tennessee* v. *Dunlap*, No. 75-95, decided June 10, 1976, slip op. 5 n. 3. We mention them because it should be clear that a decision in favor of respondent on the questions presented here need not lead to judgment in his favor on remand.

II

THE CONSTITUTION DOES NOT REQUIRE THE PROSECUTION TO DISCLOSE BEFORE TRIAL THE IDENTITIES OF UNDERCOVER AGENTS WHO WILL TESTIFY

The court of appeals held that petitioners violated the Due Process Clause of the Fifth and Fourteenth Amendments by failing to disclose in advance of respondent's criminal trial that Weatherford was an agent and would testify for the prosecution (A. 261-262). The court relied for this proposition on *Brady* v. *Maryland*, 373 U.S. 83, reasoning that by permitting Weatherford to conceal his identity and "deny up through the day before his appearance at trial that he [would] testify against the defendant," then "testify with devastating effect," the prosecution had "lull[ed]" respondent "into a false sense of security and thus den[ied] him the opportunity (1) to consider whether plea bargaining might be the best course, (2) to do a background check on Weatherford for purposes of cross examination, and (3) to attempt to counter the devastating impact of eyewitness identification" (A. 262).

The court did not link this holding to its prior conclusion that the prosecution had deprived respondent of the effective assistance of counsel. Nor is there any logical connection between the two issues; the "lulling" and the "false sense of security" were attributable to the fact that respondent did not know the strength of the prosecution's case, and to the deception necessary to maintain Weatherford's cover, rather than to any governmental knowledge about respondent's preparations for trial. The court of appeals therefore necessarily has held that the government must disclose before trial the names of its "devastating" witnesses, if not all of its "devastating" evidence, or it will jeopardize the conviction and expose its witnesses to personal liability.

No decision of this Court supports this revolutionary rule. *Brady*, upon which the court of appeals relied, requires only the disclosure of certain evidence *favorable* to the defense. The fact that Weatherford would testify for the prosecution was hardly

evidence favorable to the defense; it was "devastating" precisely because it was strong evidence of guilt. Thus, the court of appeals has held that the prosecution must give the defendant pretrial notice of the important evidence that will support the charge; but "it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge." *United States* v. *Agurs*, No. 75-491, decided June 24, 1976, slip op. 14 n. 20. Even when the Constitution requires the prosecution to disclose information, it does not require the disclosure to occur before trial (*ibid.*).[35]

It has been a fixed rule of our jurisprudence that neither the prosecution nor the defense need expose its case or its evidence to the other in advance of trial. "Discovery in criminal cases is a recent * * * development." Wright, *Federal Practice and Procedure: Criminal* § 251 (1969). In 1944, when the Advisory Committee proposed Fed. R. Crim. P. 16, it was able to write that it was "doubtful" whether existing law allowed *any* discovery in criminal cases. In 1953 Chief Justice Vanderbilt of the Supreme Court of New Jersey, who had been Chairman of the Advisory Committee, wrote a strong opinion arguing against the desirability of discovery in criminal cases

[35] See also *United States* v. *Acosta*, 526 F.2d 670 (C.A. 5), and *United States* v. *Miller*, 529 F.2d 1125, 1128 (C.A. 9), which discuss in some detail why the Constitution does not require pretrial disclosure even of evidence favorable to the defendant.

and questioning the wisdom of judicial innovations in the field. *State* v. *Tune*, 13 N.J. 203, 98 A.2d 881.

The development of criminal discovery has been almost entirely a legislative or rulemaking process, and courts have played little or no role in it.[36] No statute or rule in South Carolina required the prosecutor to disclose in advance of trial Weatherford's status, or the fact that he would testify. Nor is there such a rule in the federal courts. The Advisory Committee's proposed amendment to Rule 16 in 1974, as originally promulgated by this Court, would have required the prosecution (and the defense) to disclose the names of witnesses in most cases (see 18 U.S.C. (Supp. V) pp. 1318-1319), but Congress deleted this proposed revision. The Conference Committee report (see *id.* at 1322) stated: "A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony, were deemed paramount concerns in the formulation of this policy."

[36] Recently, some courts have suggested that the judiciary has an "inherent power" to order discovery against the government, despite the lack of a rule or statute. See, *e.g.*, *United States* v. *Cannone*, 528 F.2d 296 (C.A. 2) (*dictum*). Contra, *United States* v. *Conder*, 423 F.2d 904 (C.A. 6), certiorari denied *sub nom. Pegram* v. *United States*, 400 U.S. 958. We think that *Cannone* cuts against a long history that cannot be so easily overlooked.

There is no reason to interpret the Due Process Clause to override this time-tested policy,[37] to discard the process of legislative experimentation, and to erect a presumption in favor of disclosure before trial. As Mr. Justice Holmes put it, "[i]f a thing has been practiced for 200 years by common consent, it will need a strong case" for the Constitution to upset it now. *Jackman* v. *Rosenbaum Co.*, 260 U.S. 22, 31. There is no "strong case" for the Constitution to

[37] Although there has been debate concerning the power of the federal courts to order the prosecutor to disclose before trial the names of its expected witnesses, there has heretofore been no suggestion of any prosecutorial duty of disclosure in the absence of a court order. *United States* v. *Cannone, supra,* which indicated that district courts have such power, nevertheless reversed a disclosure order, concluding that the government's interests in avoiding disclosure usually outweigh the defendant's interests in obtaining disclosure (528 F.2d at 301-302). In cases in which the district court has denied a pretrial request by the defense for disclosure (surely a more compelling situation than that presented here, where there was no request), the courts of appeals have consistently affirmed convictions on the ground that the defendant has no general right to such information except in capital cases, where it is created by statute. See, *e.g., United States* v. *Bolden,* 514 F.2d 1301, 1312 (C.A.D.C.); *United States* v. *Payseur,* 501 F.2d 966, 972 (C.A. 9); *United States* v. *Massingale,* 500 F.2d 1224 (C.A. 4); *United States* v. *Verse,* 490 F.2d 280, 282 (C.A. 7), certiorari denied, 416 U.S. 989; *United States* v. *White,* 450 F.2d 264, 268 n. 6 (C.A. 5); *United States* v. *Harflinger,* 436 F.2d 928, 936 (C.A. 8), certiorari denied, 402 U.S. 973. Cf. *United States* v. *Nakaladski,* 481 F.2d 289, 297 n. 5 (C.A. 5), certiorari denied *sub nom. Coco* v. *United States,* 414 U.S. 1064; *United States* v. *Murphy,* 480 F.2d 256, 259 (C.A. 1), certiorari denied, 414 U.S. 912; *United States* v. *Jordan,* 466 F.2d 99, 101-102 (C.A. 4).

upset the practice of non-disclosure of the names of prosecution witnesses.

The pros and cons of pretrial disclosure of the identity of witnesses in criminal cases have been and should remain a matter for determination by the legislative authority. Three years ago the Court wrote that "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded" (*Wardius* v. *Oregon,* 412 U.S. 470, 474), and that the Due Process Clause does not require a State to adopt reciprocal pretrial discovery devices (*id.* at 475). The court of appeals has not proffered sufficient reasons to support a contrary view.

The government's constitutional duty to disclose under the *Brady* line of cases rests upon the proposition that a trial is fundamentally unfair if conducted while the defendant is ignorant of material exculpatory evidence known to the prosecutor, and the prosecutor has violated a duty to disclose that evidence. See generally *United States* v. *Agurs, supra.* The court of appeals did not suggest that Solicitor Foard violated any duty to respond to a request by the defense for exculpatory evidence; there was no defense request of any kind, Weatherford's testimony and identity were not exculpatory, and, of course, they were not withheld during trial.

The court of appeals' reasoning leads directly to a requirement that the prosecution open its files in advance of trial. Only with all of the prosecution's evidence in front of it could an accused "consider

whether plea bargaining might be the best course;" [38] only with the names of all the prosecution's witnesses in front of it could the defense "do a background check" on each; [39] only with all of the prosecution's evidence in front of it could the defense have more time to "attempt to counter [its] devastating impact." This Court has long recognized, however, that important considerations—including preservation of the traditional adversary system, prevention of manu-

[38] The court of appeals' argument with respect to plea bargaining is also wide of the mark because an accused has no constitutional complaint if the prosecution simply rebuffs all requests to bargain. See generally the Advisory Committee's commentary on Fed. R. Crim. P. 11(e) and *United States* v. *Werker*, 535 F.2d 198 (C.A. 2). Solicitor Foard could have refused to bargain, and it therefore cannot be a violation of the Constitution that the prosecution's tactics simply made a plea arrangement less likely.

[39] There is some irony in the court of appeals' argument that the prosecutor's decision to use Weatherford as a witness denied respondent and his attorney the opportunity to investigate Weatherford and his story. The first meeting between Weatherford and Wise—a meeting that the court of appeals found violated the Sixth Amendment—was devoted primarily to Wise's attempts to find out about Weatherford's observations and background. See A. 81, 249, 252.

Moreover, Wise had an opportunity at the criminal trial to cross-examine Weatherford about his background and declined to do so. No evidence has subsequently been discovered that could have been used to impeach Weatherford's testimony. After the criminal trial Wise learned, "simply [by] talking to people" (A. 94), that Weatherford may have been arrested on a narcotics charge (cf. A. 90). But at the civil trial Weatherford testified that he had not been arrested other than as part of his undercover activities (A. 189), and respondent has not produced any evidence to cast doubt upon this testimony.

factured defenses, and forestalling threats to and subornation of potential witnesses—militate against a system of pretrial disclosure of the prosecution's case. "[T]here is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor" (*United States* v. *Agurs*, *supra*, slip op. 9).

The considerations invoked by the court of appeals show no more than that surprise may have its effects. It can be debated how "surprising" Weatherford's testimony was to the defense; the district court concluded that the defense had cause to suspect all along that Weatherford was an informant (A. 253). The defense was not unaware of Weatherford's existence; respondent knew that he was an eyewitness, Wise had interviewed him, and the only uncertainty was whether he would testify. But however that may be, a claim of genuine surprise would merit at most a continuance. Perhaps it would have been an abuse of discretion for the state court to have denied a request by respondent for a continuance of his criminal trial in these circumstances, but his counsel never requested a continuance, and there was no appeal. It is mystifying how these events can give rise to a constitutional claim for money damages.

We also submit that the court of appeals has selected the wrong remedy, even assuming that it correctly held that Weatherford's status as an agent and potential witness should have been disclosed in advance of trial. There has been no showing of improper motive; it appears to be unquestioned that the prose-

cutor did not decide until the morning the trial began that he would use Weatherford as a witness (A. 249-250). The arguments we have made at pages 49-52, *supra*, apply with special force to the decision to call Weatherford as a witness. The decision was made by Solicitor Foard, not by Weatherford or Strom, and no purpose could be served by requiring Weatherford or Strom to respond in damages for the acts of Foard. The right at stake—the right to a fair trial—is one that ordinarily must be vindicated through the trial and appellate process. A defendant should not be allowed to make no objection, bypass his appeal, and then complain years later that decisions of the prosecutor and other governmental personnel so infected the trial with unfairness that a monetary remedy is appropriate. If the Court rejects our submission that there was no unfairness here, we submit that it should remand the case to the court of appeals for further consideration of these arguments.[40]

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[40] The third question presented by petitioners (Pet. 2) concerns the liability of Chief Strom, Weatherford's superior officer. The court of appeals' decision on this question appears to involve primarily the facts of this case rather than any disputed legal principle, and we therefore do not address the matter at length. If our argument that none of Weatherford's acts violated the Constitution is correct, then the court of appeals' judgment must be reversed as to Strom as well.

Even if Weatherford's acts (or those of Solicitor Foard) violated the rights of respondent, however, there is no reason to impute these acts to Strom. Cf. *Rizzo* v. *Goode*, 423 U.S. 362, 371, 376-377. If *respondeat superior* applied in actions under 42 U.S.C. 1983 (a question on which we express no opinion), it would not lead to liability for Strom. The doctrine requires the employer of an employee to answer for the employee's acts. However, Strom was not Weatherford's employer, but simply his supervisor.

The court of appeals appeared to conclude that Strom's liability rested upon his failure to prevent Weatherford's acts (A. 262-263). Although we agree with the court of appeals that this may in special cases be an adequate basis of personal responsibility (cf. *United States* v. *Park*, 421 U.S. 658, 670-673), we believe that this principle does not support Strom's liability in this case. Strom did no more than allow Weatherford to continue acting undercover. He did not know that Weatheford had participated in meetings with respondent and Wise, and he was not responsible for Solicitor Foard's decision to call Weatherford as a witness (A. 106, 131, 247-251). Even the court of appeals concluded that there was "no evidence of Strom's direct personal supervision of" Weatherford's undercover activities (A. 258). The most that can be said is that Strom did not attempt to prevent Foard and Weatherford from acting as they did; unless the Constitution creates a duty to act in these circumstances, Strom cannot be liable for his inaction. Cf. *Sims* v. *Adams*, 537 F.2d 829 (C.A. 5).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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